

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75 - 1246

✓ B
P/S

To be Argued by
Roy M. Cohn

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

FERGUS M. SLOAN, JR., et al.,

Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK

APPELLANT'S BRIEF

SAXE, BACON & BOLAN, P.C.
Attorneys for Appellant
Fergus M. Sloan, Jr.
39 East 68th Street
New York, New York 10021
(212) 472-1400

Roy M. Cohn
Michael Rosen

Of Counsel

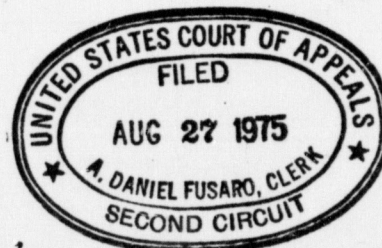


TABLE OF CONTENTS

	Page
Issues Presented	2
Preliminary Statement	3
Statement of Facts	3
Argument:	
I. THE GOVERNMENT'S FAILURE TO COMPLY WITH THE TERMS OF THE PLEA ARRANGE- MENT MANDATES THAT THE APPELLANT BE ALLOWED TO WITHDRAW HIS PLEA OF GUILTY AND PROCEED TO TRIAL.	5
II. AT THE VERY MINIMUM, THIS COURT SHOULD REMAND THE INSTANT CASE FOR A HEARING TO DETERMINE THE NATURE OF THE PLEA AGREEMENT AND ONLY THEN DECIDE WHETHER THE APPELLANT'S PLEA SHOULD BE WITHDRAWN	12
Conclusion	15

TABLE OF CITATIONS

	<u>Page</u>
<u>United States ex rel. Eklonis v. Gilligan</u> , 256 F.Supp. 244 (S.D.N.Y., 1966)	5
<u>Palermo v. Rockefeller</u> , 323 F. Supp 484-485 S.D.N.Y., 1971)	5
<u>Bram v. United States</u> , 168 U.S. 532, 543, 18 S. Ct. 183, 42 L. Ed. 568	6
<u>Chambers v. Florida</u> , 309 U.S. 227, 60 S. Ct. 472, 84 L. Ed. 716	6
<u>Johnson v. Zerbst</u> , 304 U.S. 458, 467, 58 S. Ct. 1019, 82 L. Ed. 1416	6
<u>Weley v. Johnston</u> , 316 U.S. 101, 104, 62 S. Ct., 964, L. Ed. 1302 (1942)	6
<u>Schoultz v. Hocker</u> , 469 F.2d 681 (9th Cir., 1972) . . .	6
<u>White v. Gaffney</u> , 435 F.2d 1241, 1245 (10th Cir., 1971)	6, 7
<u>United States v. Napolitano</u> , 212 F.Supp. 743 (S.D.N.Y., 1963)	7
<u>United States v. McGahey</u> , 449 F.2d 738 (9th Cir., 1971)	7
<u>Kercheval v. United States</u> , 274 U.S. 220, 224, 47 S. Ct., 582, 583, 71 L. Ed. 1009 (1927)	8, 10
<u>Brady v. United States</u> , 397 U.S. 742, 748, 90 S. Ct. 1436, 1369, 25 L. Ed. 2d 747 (1970)	8
<u>United States v. Hughes</u> , 325 F.2d (2nd Cir., 1964) .	9
<u>United States v. Bayaud</u> (C.C.), 23 Fed. 721	10
<u>Com. v. Crapo</u> , 212 Mass. 209, 98 N.E. 702	10
<u>United States v. Lester</u> , 247 F.2d 496 (2nd Cir., 1957)	10
<u>United States v. Battle</u> , 447 F.2d 950, 951-952 (5th Cir., 1970)	11
<u>Boykin v. Alabama</u> , 395 U.S. 238, 242-243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)	11

TABLE OF CITATIONS (Cont.)

Page

<u>United States v. Malcolm</u> , 432 F.2d 809, 812 (2nd Cir., 1970)	11
<u>Machibroda v. United States</u> , 386 U.S. 487, 82 S. Ct. 510, 7 L. Ed. 2d 473 (1962)	11, 12
<u>United States v. Davis</u> , 212 F.ed 204, 207 (7th Cir., 1954)	11
<u>Williams v. United States</u> , 192 F.2d 39,40 (5th Cir., 1951)	11
<u>Santobello v. New York</u> , 404 U.S. 257, 263, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971)	12
<u>United States v. Tivis</u> , 302 F.Supp 581 (N.D.Tex. 1969), aff'd 421 F.2d 147	12
<u>United States ex rel. Alicea v. LaVallee</u> , 239 F.Supp. 721 (N.D.N.Y., 1965)	13
<u>United States v. Ptomey</u> , 244 F. Supp. 464 (W.D.Pa.,1965)	13
<u>People v. Maney</u> , _____ N.Y.2d _____ N.Y.L.J. July 10, 1975 p. 1	13
<u>United States ex rel. McGrath v. LaVallee</u> , 319 F.2d 308 (2nd Cir., 1963)	14
<u>United States v. Gonzalez-Hernandez</u> , 481 F.2d 648, 650 (5th Cir., 1973)	14

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

FERGUS M. SLOAN, JR., et al.,

Appellants.

ON APPEAL FROM AN ORDER OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK

APPELLANT'S BRIEF

SAXE, BACON & BOLAN, P.C.
Attorneys for Appellant
Fergus M. Sloan, Jr.
39 East 68th Street
New York, New York 10021
(212) 472-1400

Roy M. Cohn
Michael Rosen

Of Counsel

ISSUES PRESENTED

- I. THE GOVERNMENT'S FAILURE TO COMPLY WITH THE TERMS OF THE PLEA ARRANGEMENT MANDATES THAT THE APPELLANT BE ALLOWED TO WITHDRAW HIS PLEA OF GUILTY AND PROCEED TO TRIAL

- II. AT THE VERY MINIMUM, THIS COURT SHOULD REMAND THE INSTANT CASE FOR A HEARING TO DETERMINE THE NATURE OF THE PLEA AGREEMENT AND ONLY THEN DECIDE WHETHER THE APPELLANT'S PLEA SHOULD BE WITHDRAWN

PRELIMINARY STATEMENT

This is an appeal from an order of the Honorable Whitman Knapp, United States District Judge, Southern District of New York denying a motion by the appellant, Fergus M. Sloan, Jr., to withdraw his plea of guilty.

STATEMENT OF FACTS

On September 10, 1974, the appellant Fergus M. Sloan, Jr. ("Sloan") and four other co-defendants were indicted for violations of the federal securities laws. Discussions took place between Sloan's attorneys and Assistant United States Attorney Kenneth Feinberg ("Feinberg") with a view toward disposition of the case against Sloan.

On March 31, 1975, Sloan pled guilty to one count of conspiracy. The only defendant of the original five who went to trial and was convicted was the defendant Anderson.

Sloan pled guilty upon the understanding achieved by his counsel and Feinberg that if the appellant pled guilty and cooperated with the government in its case against Anderson, the prosecutor would "go to bat" for Sloan with the sentencing judge. Feinberg conceded this when he stated:

"The Government, through your affiant, did state to both the defendants Sloan and Eucker that if they pleaded guilty and cooperated

with the Government in the preparation and presentation of the trial against the defendant Anderson . . . the Government would, in such a case, 'go to bat' for them." (Feinberg affidavit, p. 76a)*

Sloan's plea was made in reliance upon such an understanding and was prompted almost solely by it (Sloan affidavit, p. 69a). In fact, he complied with the terms as agreed upon:

"After pleading guilty, . . . Sloan . . . met with me on one occasion to discuss the case in preparation for the trial against Anderson. (He was) less than candid, playing down (his) own involvement at the expense of Anderson. (He did not) testify at the trial." (Feinberg letter of June 5, 1975, p. 30a)

Sloan cooperated with the prosecution in its case against Anderson, but was not called upon to testify. The understanding with the prosecutor was not conditioned upon such testimony (Feinberg affidavit, p. 76a, Rosen affidavit, p. 80a)

The prosecutor did not "go to bat" for Sloan, nor did he take any other affirmative action which might have been in contemplation of the understanding. Based on this, Sloan moved to withdraw his plea upon the unfulfilled promise of Feinberg. The District Court denied this motion and it is from such denial that this appeal is taken.

* References are to pages in the Appendix.

ARGUMENT

POINT I: THE GOVERNMENT'S FAILURE TO COMPLY WITH THE TERMS OF THE PLEA ARRANGEMENT MANDATES THAT THE APPELLANT BE ALLOWED TO WITHDRAW HIS PLEA OF GUILTY AND PROCEED TO TRIAL.

There can be no question that if a promise was made to the appellant Sloan to induce him to plead guilty and this promise was subsequently broken, he must be allowed to withdraw his plea. The statements of Mr. Feinberg conclusively show that the government failed to "go to bat" for the appellant as it had previously agreed.

"While a plea of guilty, if voluntarily and knowingly made, may not be challenged on grounds which relate to the motivation for the plea (citations omitted), it is a fundamental prerequisite of the plea negotiation process that the representations made to the defendant be accurate, and that promises made to him be kept, United States ex rel. Elksnis v. Gilligan, 256 F.Supp. 244 (S.D.N.Y., 1966)." Palermo v. Rockefeller, 323 F. Supp. 484-485 (S.D.N.Y., 1971).

In the instant case, the record clearly manifests that the United States Attorney made specific representations to the appellant or to his counsel. In reply to Sloan's motion of June 25, 1975, Assistant United States Attorney Feinberg affirmed:

"The Government, through your affiant, did state to both the defendants Sloan and Eucker that if they pleaded guilty and cooperated with the Government in the preparation and presentation of the trial against the defendant Anderson . . . the Government would, in such a case, 'go to bat' for them." (Feinberg affidavit, p. 76a)

There can be no question that the appellant met the terms of this agreement. On March 31, 1975, Sloan pled guilty to one count of the indictment and soon thereafter appeared in Feinberg's office and sought to provide whatever information he had as to the defendant Anderson. The mere fact that Mr. Feinberg later felt that Sloan's information was of no value and thus appellant's testimony at Anderson's trial would not be of assistance, does not in any way diminish the fact that an agreement had been made and subsequently breached by the attorney for the government.

"If the allegations are found to be true, petitioner's constitutional rights were infringed. For a conviction on a plea of guilty coerced by a federal law enforcement officer is no more consistent with due process than a conviction supported by a coerced confession. Bram v. United States, 168 U.S. 532, 543, 18 S. Ct. 183, 42 L. Ed. 568; Chambers v. Florida, 309 U.S. 227, 60 S. Ct. 472, 84 L. Ed. 716. And if his plea was so coerced as to deprive it of validity to support the conviction, the coercion likewise deprived it of validity as a waiver of his right to assail the conviction. Johnson v. Zerbst, 304 U.S. 458, 467, 58 S. Ct. 1019, 82 L. Ed. 1416." Weley v. Johnston, 316 U.S. 101, 104, 62 S. Ct., 964, L. Ed. 1302 (1942).

Indeed, many of the Circuits have held specifically that if a prosecutor's representations influenced a defendant to plead guilty, then a defendant has a right to rely on them. Schoultz v. Hocker, 469 F.2d 681, 682 (9th Cir, 1972); White v. Gaffney, 435 F.2d 1241, 1245, (10th Cir., 1971). The appellant has clearly pointed out that:

"In considering whether or not to enter a plea of guilty in this action, I relied upon what I was told by my attorneys, Roy M. Cohn and Michael Rosen, and by Assistant U.S. Attorney Kenneth Feinberg. I was told that Mr. Feinberg, if I took a plea and would make myself available and cooperate, would 'go to bat' for me with the sentencing judge. Mr. Feinberg has conceded this to the Court. While I understand that no one could promise to bind the judge's hands to set disposition, I believed that when the prosecutor took an affirmative position with the Court, the Court would go along with what was suggested by him. (Sloan affidavit, p. 69a)

"Whether or not the recommendation would have been effective is immaterial, . . . The record is clear that without the agreement the guilty plea would not have been made and there would have been no post-sentence action." White v. Gaffney, supra, at 1245.

There can be no question from the record that promises were made to the appellant. In such a case the law clearly provides that the appellant should be allowed to withdraw his plea of guilty and proceed to trial. After sentence a plea will be allowed to be withdrawn to prevent "manifest injustice" (Rule 32(d), Federal Rules of Criminal Procedure). A broken promise of the prosecutor has been held to constitute such "manifest injustice." United States v. Napolitano, 212 F. Supp. 743 (S.D.N.Y., 1963), Reed v. United States, 437 F.2d 54, United States v. McGahey, 449 F.2d 738 (9th Cir., 1971). This very Court has recently stated:

"[I]t would be an abuse of discretion for a judge to refuse to allow withdrawal of a guilty plea if, on the facts before him, a conviction thereon could not withstand collateral attack. The question thus becomes whether defendants' guilty pleas were 'unfairly obtained

or given through ignorance, fear or inadvertance,' Kercheval v. United States, 274 U.S. 220, 224 47 S. Ct., 582, 583, 71 L. Ed. 1009 (1927), or constituted 'knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences,' Brady v. United States, 397 U.S. 742, 748, 90 S. Ct. 1436, 1369, 25 L. Ed. 2d 747 (1970)." United States v. Pisacano, 459 F.2d 259, 262 (2nd Cir., 1972).

This is not a case where the prosecutor stated to the defendant: "If you plead guilty, you will get five years, but if we have to go to trial, you will get ten years." If it were, then Judge Connor's question at the time of the plea, as read by Judge Knapp on sentencing: "Has any promise been made to you in respect to the kind of sentence the Court might impose? (Sloan) - No, sir," might close the matter (Trans. Sentenc., p.36a). This is apparently what Judge Knapp and Mr. Feinberg believed the situation to be.

It should be pointed out that oft-times such purely ritualistic exchanges are merely to save time and allow the plea to be accepted according to the constitutional and statutory requirements. Yet, all parties involved are well aware that a defendant is not pleading guilty and thus saving the prosecution the time, trouble and expense of a trial, without some expectation and understanding of assistance and/or leniency. The instant case, however, is quite different - no sentence was involved in the discussions prior to the entry of appellant's plea, but there was a clear commitment from

Mr. Feinberg that he would "go to bat" for Sloan. Indeed, this was twice pointed out to Judge Knapp at sentencing:

"MR. COHN: Your Honor, I am not suggesting it was a question of what the Court would impose. It was what the prosecution would recommend.

* * *

I think that it was not a question of the sentence the Court would impose. It was, I think, a question of what the prosecution would recommend." (Transcript of June 16, 1975, p. 36a.)

Mr. Sloan complied with the government's request that he provide information concerning the defendant Anderson. The mere fact that this information was not thought helpful by Mr. Feinberg does not in any way reflect on this appellant's good-faith attempt to comply with his part of the bargain nor does it exonerate this government from being bound by it. Although cooperation with the government is not alone sufficient to mandate the granting of a Rule 32(d) motion, when the defendant demonstrates that his cooperation was induced by representations of the government which were later repudiated, the motion should be granted. United States v. Hughes, 325 F.2d (2nd Cir., 1964), cert. den. 377 U.S. 907, rehearing den. 377 U.S. 940.

Whether Mr. Feinberg was satisfied with the information Sloan provided him or whether his subjective determination

was that the appellant could provide nothing if called upon to testify at the trial of Anderson is of little moment. Mr. Feinberg's conclusions in no way vitiated the agreement and he was still obligated to comply with its terms. The mere fact that he said nothing to Judge Knapp at sentencing and castigated Mr. Sloan in his June 5, 1975 letter warrant the withdrawal of the plea. An examination of this letter shows the extent to which Mr. Feinberg "went to bat" for Sloan (p. 30a).

"Out of just considerations for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. When one so pleads he may be held bound. United States v. Bayaud (C.C.), 23 Fed. 721. But on timely application, the court will vacate a plea of guilty shown to have been unfairly obtained or given through ignorance, fear or inadvertance. Such an application does not involve any question of guilt or innocence. Com. v. Crapo, 212 Mass. 209, 98 N.E. 702. The court in exercise of its discretion will permit one accused to substitute a plea of not guilty and have a trial if for any reason the granting of the promise seems fair and just. (citations omitted)" Kercheval v. United States, 274 71 L.Ed. 1009 (1927).

In such a case as this, if a defendant is led into a false sense of security by the representations of the prosecutor, his plea cannot stand. United States v. Lester, 247 F.2d 496 (2nd Cir., 1957). Disappointment on the part of the prosecutor as to the information provided by Sloan is not the criteria by which such a motion is determined.

"[T]he government ought not be allowed to lure the defendant into a plea on false information." United States v. Battle, 447 F.2d 950, 951-952 (5th Cir, 1970). Yet this is exactly what Mr. Feinberg did in the present case. Because the information provided by the appellant did not suit the government's case against Anderson, Feinberg, with appellant's plea already before the court, opted to ignore his commitment and punish Sloan through the June 5, 1975 letter (less than two weeks before sentencing), not for failing to be candid, but rather for doing exactly what he had agreed to do - provide information against Anderson. (Feinberg affidavit, p.76a)

"[A] plea which is the tainted product of ignorance, incomprehension, coercion, terror, inducements, threats or promises is void. Boykin v. Alabama, 395 U.S. 238, 242-243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969)." United States v. Malcolm, 432 F.2d 809, 812 (2nd Cir., 1970); see also: Machibroda v. United States, 386 U.S. 487, 82 S. Ct. 510, 7 L. Ed. 2d 473 (1962); United States v. Davis, 212 F.2d 204, 207 (7th Cir., 1954); Williams v. United States, 192 F.2d 39,40 (5th Cir., 1951).

We submit that the facts and the applicable law warrant a reversal of Judge Knapp's order and the failure of the prosecutor to comply with his agreement to "go to bat" for the appellant at sentencing requires that the appellant be allowed to withdraw his plea of guilty and proceed to trial.

POINT II: AT THE VERY MINIMUM, THIS COURT
SHOULD REMAND THE INSTANT CASE
FOR A HEARING TO DETERMINE THE
NATURE OF THE PLEA AGREEMENT AND
ONLY THEN DECIDE WHETHER THE
APPELLANT'S PLEA SHOULD BE
WITHDRAWN

The failure of the District Court to conduct a hearing on the appellant's allegations has reduced the record presentable to this Court. Despite at least two requests by appellant's counsel, the District Court refused to conduct a hearing in this matter. On the day of sentence, counsel moved for a withdrawal of Sloan's plea or in the alternative for a hearing to determine the precise nature of the government's agreement (Transc. Sentenc. pp. 47a & 48a). Additionally, appellant's reply papers in support of the motion suggested this procedure (Rosen affidavit, p. 82a).

The Supreme Court has determined that if there has been a breach of an agreement, as this Court must find, the trial court can determine the relief.

"The ultimate relief to which petitioner is entitled we leave to the discretion of the state court, which is in a better position to decide whether the circumstances of the case require that there be specific performance of the agreement or the plea, in which case petitioner should be resentenced by a different judge, or whether in the view of the state court, the circumstances require granting the relief sought by the petitioner, i.e., the opportunity to withdraw his plea of guilty." Santobello v. New York, 404 U.S. 257, 263, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971); see: Machibroda v. United States, supra; United States v. Tivis, 302 F.Supp. 581 (N.D.Tex. 1969), aff'd 421 F.2d 147.

Several District Courts have realized the seriousness of such allegations and have conducted extensive inquiries into similar situations:

"This application is another one of increasing claims of this kind, troublesome only in view of the nebulous principle difficult to apply practically that the improbably challenge of this kind must be searched through and heard out unless clearly incredible." (Citations omitted.) United States ex rel. Alicea v. LaVallee, 239 F. Supp 721 (N.D.N.Y., 1965).

"What I presently search for is any undue influence or illegal process by which the defendants may have been induced or unknowingly persuaded into an involuntary plea of guilty before me in open court. If such evidence appears, I may well be persuaded that such undue influence mounted to violations of the defendants' constitutional rights." United States v. Ptomey, 244 F. Supp 464 (W.D.Pa., 1965), aff'd 366 F.2d 759

In the recent case of People v. Maney, _____ N.Y. 2d _____, N.Y.L.J. July 10, 1975, p. 1, the New York Court of Appeals was faced with a very similar situation. The defendant had agreed to plead guilty and cooperate with the prosecutor, and the latter agreed that he "would recommend to the sentencing court that the defendant be sentenced to a term of probation and not a term of imprisonment. The trial court, reluctant to accept the plea in light of all the charges, ordered a hearing to determine the commitments which had been made by the prosecutor. Holding that the defendant acted in reliance upon the prosecutor's representations, the Court accepted the plea, sentencing the defendant to a prison term of one year.

This was based on a finding that the representations of the prosecutor applied solely to acceptance of the plea and not to sentencing. The Court of Appeals, in affirming, stated:

"With respect to the 'cooperation agreement' the District Attorney, in consenting to a misdemeanor plea . . . and by recommending to the trial judge a sentence of probation, fulfilled his obligations under the agreement." (Emphasis supplied.)

In the instant matter, not only did Mr. Feinberg breach his agreement, but also urged that the appellant be incarcerated. In no way can this be construed as "going to bat" for the appellant. While Judge Knapp would not have been bound by any recommendation from the government, it almost certainly would have had a significant effect on the ultimate sentence.

The law in this Circuit has been clearly established by this Court, and when a case such as the instant matter arises, it is incumbent upon the District Court to grant the appellant a hearing. The mere denial of facts by the government creates the factual issues which require such a hearing. United States ex rel. McGrath v. LaVallee, 319 F.2d 308 (2nd Cir., 1963); see also: United States v. Gonzalez-Hernandez, 481 F.2d 648, 650 (5th Cir., 1973).

An examination of Judge Knapp's opinion clearly indicates his failure to take into consideration the factors as presented to this Court and as mandated by the case law. We submit that the data provided herein clearly warrants this Court's directing that the appellant be allowed to withdraw

his plea of guilty and proceed to trial, or at the very least, that the District Court be directed to conduct an evidentiary hearing and make specific findings of fact as to the government's breach of its agreement.

CONCLUSION

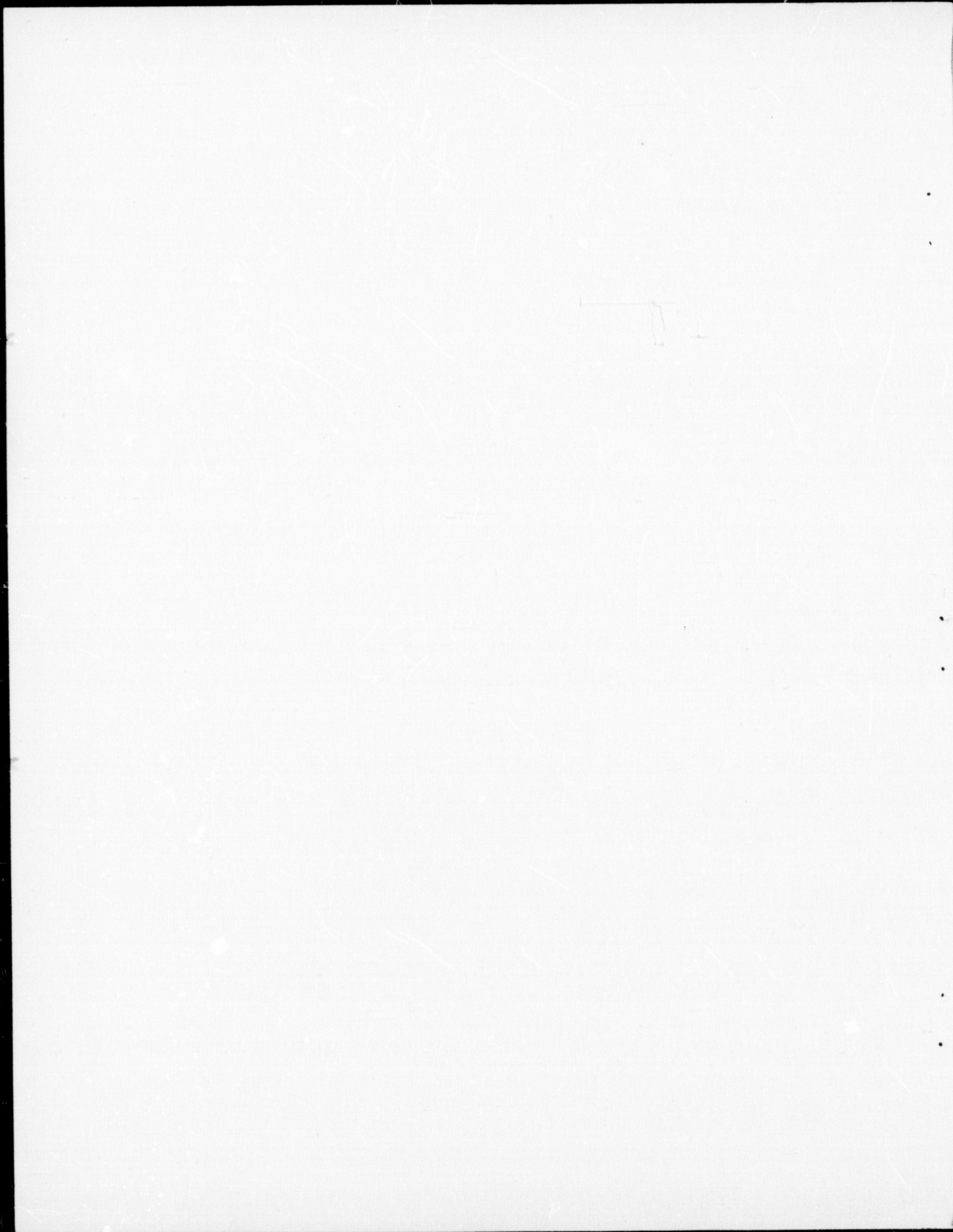
For the reasons enumerated above, it is respectfully requested that this Court reverse the order of the District Court.

Respectfully submitted,

SAXE, BACON & BOLAN, P.C.
39 East 68th Street
New York, New York 10021
(212) 472-1400

Roy M. Cohn
Michael Rosen

Of counsel



COPY RECEIVED
AUG 27 1975
PAUL J. CURRAN
U.S. ATTORNEY
SO. DIST. OF N.Y.